# Olympia Land Bhd v Ng Poh Kwang Chartered Architect & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–16 OF 2001
LAU BEE LAN J
2 JANUARY 2008

*Civil Procedure — Costs — Getting-up fee — Summons to review taxation by senior assistant registrar ('SAR') — Application filed before certificate issued — Whether the application premature — Discretion of court — Whether SAR erred in deciding quantum — Whether SAR's justification for award erroneous — Rules of the High Court 1980 O 59 r 36*

This was an appeal against the review made by the learned senior assistant registrar ('SAR') regarding the applicants' bill of costs. The review arose as a result of a notice of taxation of bill of costs dated 5 December 2003 which was taxed on 5 February 2004 before the learned deputy registrar of which the first respondent filed a notice of review of taxation (encl 17) which was heard by the learned SAR on 7 June 2004. On 2 August 2004 the said application was dismissed without any order as to costs. Counsel for the first respondent informed the court that he had written to the court vide a letter dated 15 July 2004 requesting the reasons for the decision, however, no certificate was forthcoming. Upon perusing the court's docket, the court managed to retrieve a reasoned decision of the learned SAR who had heard the review of the taxation. The applicant contended that the notice of review dated 7 June 2004 was premature and accordingly, urged the court to dismiss the application.

**Held**, dismissing the application with costs to be taxed:

(1) The 14-day period would run from 2 August 2004 and the last date for the filing of encl 17 would be 16 August 2004. In this case, the first respondent had filed encl 17 on 7 June 2004 which was slightly above two months before the due date. However, the certificate was never issued to the first respondent's solicitor despite its request. Although encl 17 was filed prematurely, nevertheless due to the circumstances of the case, the court was not inclined to dismiss the encl 17 but instead proceeded with the merits of the application (see para 7).

(2) It is trite from a plethora of authorities, the premise upon which the court would interfere with the decision of the taxing registrar is if it can be clearly shown that in the exercise of his discretion to award the costs, the taxing registrar has made an obvious mistake or has exercised his discretion capriciously or mischievously or there are some errors of principles. However, in this case, after having considered the reasons of the learned SAR as contained in her certificate, there was no valid ground to interfere with her exercise of discretion as she had taken into account the relevant principles (see paras 8 & 11).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap semakan yang telah dibuat oleh PKP berkenaan dengan bil kos pemohon. Semakan timbul disebabkan notis taksiran bil kos yang bertarikh 5 Disember yang telah ditaksirkan pada 5 Februari 2004 di hadapan timbalan pendaftar yang bijaksana yang mana responden pertama telah memfailkan notis semakan taksiran (lampiran 17) yang telah didengar oleh PKP yang bijaksana pada 7 Jun 2004. Pada 2 Ogos 2004 permohonan tersebut telah ditolak tanpa perintah terhadap kos. Peguamcara responden pertama telah memberitahu mahkamah bahawa beliau telah menulis kepada mahkamah melalui sepucuk surat yang bertarikh 15 Julai 2004 yang memohon alasan keputusan, tetapi tiada sijil diberikan. Apabila meneliti doket mahkamah, mahkamah berjaya memperolehi alasan keputusan PKP yang bijaksana yang telah mendengar semakan taksiran tersebut. Pemohon menegaskan bahawa notis semakan yang bertarikh 7 Jun 2004 adalah pra matang dan sewajarnya menggesa mahkamah untuk menolak permohonan tersebut.

**Diputuskan**, menolak permohonan dengan kos untuk ditaksirkan:

(1) Tempoh 14 hari bermula dari 2 Ogos 2004 dan tarikh akhir untuk memfailkan lampiran 17 adalah 16 Ogos 2004. Dalam kes ini, responden pertama telah memfailkan lampiran 17 pada 7 Jun 2004 yang lebih dua bulan sebelum tarikh akhir. Tetapi, sijil tidak dikeluarkan kepada peguamcara responden pertama walaupun ia memintanya. Walaupun lampiran 17 difailkan pra matang, namun berdasarkan kepada keadaan kes, mahkamah tidak mahu menolak lampiran 17 tetapi meneruskan dengan merit permohonan (lihat perenggan 7).

(2) Adalah satu kebiasaan dalam kebanyakan autoriti, keadaan di mana mahkamah akan mencampuri keputusan pendaftar yang menaksir jika boleh secara jelas ditunjukkan dalam melaksanakan budibicaranya secara berubah-ubah yang berniat jahat atau terdapat kesalahan prinsip.

Tetapi, dalam kes ini, selepas mempertimbangkan alasan PKP yang bijaksana seperti mana yang terkandung dalam sijilnya, tidak terdapat alasan yang sah untuk campur tangan dengan perlaksanaan budibicaranya yang mana beliau telah mengambilkira prinsip-prinsip yang relevan (lihat perenggan 8 & 11).]

**Notes**

For cases on getting-up fee, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1957–1967.

**Cases referred to**

*Bar Council v Datuk V Kanagalingam* [2000] 3 CLJ 697 (refd)
*Gelombang Sepadu Sdn Bhd v Tal Seng Enterprise Sdn Bhd* [1998] 7 MLJ 187 (refd)
*Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [2002] 3 MLJ 705 (refd)
*Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 (refd)
*MC Corbett v Ipoh Tin Dredging Ltd* [1936] 1 MLJ 222 (refd)
*Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97 (refd)
*Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146 (refd)
*Tan Boon Bak Trading Sdn Bhd v Chua Choong Yin* [2004] 3 CLJ 695 (folld)
*Union Insurance Malaysia Sdn Bhd v Chan You Young* [2003] 3 MLJ 484 (refd)

**Legislation referred to**

Rules of the High Court 1980 O 59 r 36(2)

*Skrine for the applicant.*
*Rajinder Singh s/o Gurgev Singh (Rejinder Singh & Associates) for the first respondent.*

**Lau Bee Lan J:**

**[1]** This is a review of the applicants' bill of costs reviewed by the learned senior assistant registrar ('SAR') Puan Norakhmar bt Mohd Sani.

**[2]** This review arose as a result of a notice of taxation of bill of costs dated 5 December 2003 (encl 15) which was taxed on 5 February 2004 before the learned deputy registrar ('DR'), Tuan Mohd Faiz bin Dziyauddin of which the first respondent's solicitor filed a notice of review of taxation (encl 17) which was heard on 7 June 2004 by the learned SAR who on 8 July 2004 dismissed the application (encl 17) without any order as to cost.

**[3]** Both learned counsel for the first respondent and the applicant stood on common ground that to date no certificate from the registrar has been issued stating the reasons for the learned SAR's decision.

**[4]** Learned counsel for the applicant, Mr WL Lam drew to the court's attention the authority of *Tan Boon Bak Trading Sdn Bhd v Chua Choong Yin* [2004] 3 CLJ 695. In that case, the Court of Appeal held that the 14 days prescribed period for purposes of review to a judge in chambers under O 59 r 36(2) of the Rules of the High Court 1980 ('the RHC') by adopting a purposive interpretation, that time ought only to begin to run after the Registrar has given his certificate. The Court of Appeal also held that:

> [T]he certificate can come in any form. It may come in the form of an allocatur. Or it may come in the form of a reasoned judgment in support of his decision. The open ended definition of the expression 'certificate' in the first rule of O 59 admits of such a conclusion. (O 59 r 1 of the RHC defines the term 'certificate' as including an allocatur).

**[5]** According to Mr Lam if the court is to follow *Tan Book Bak Trading Sdn Bhd*, the notice of review which is dated 7 June 2004 (later redated 7 June 2006 — I am unable to make out the reason for the change of date) is premature and the application should be dismissed; he held the position that this is on technical objection and leaves it to the court to decide; however he implored the court to hear the merits of the first respondent's application.

**[6]** Learned counsel for the first respondent, Mr Rajinder Singh informed the court that he had written to the court vide a letter dated 15 July 2004 requesting from the learned DR (should be SAR) the reasons for her decision given on 8 July 2004, to wit he said no certificate was forthcoming.

**[7]** In perusing the court's docket, I managed to retrieve a reasoned decision of the learned SAR who heard the review of taxation dated 2 August 2004 titled 'Sijil Perakuan Pendaftar Di Bawah Aturan 59 Kaedah 35(3) Kaedah-Kaedah Mahkamah Tinggi 1980'. Based on the authority of *Tan Boon Bak*, the 14 days period would run from 2 August 2004 and the last date for filing of encl 17 would be 16 August 2004. Here the first respondent had filed encl 17 on 7 June 2004 which is slightly above 2 months before the due date. I find the reasoned decision of the learned SAR dated 2 August 2004 when following *Tan Boon Bak*'s case qualifies as a certificate ('the certificate of the learned SAR') but it was never issued to the first respondent's solicitor despite the request being made. It is strange why the certificate of the learned SAR dated 2 August 2004 was not issued to the solicitors for the first respondent. I take note that encl 17 was filed albeit premature.

**[8]** Nevertheless due to the circumstances of the case as I have pointed out earlier, I am incline not to dismiss encl 17 but instead to proceed with the merits of the application. I shall be approaching this application (encl 17) with the benefit of the certificate of the learned SAR. Both Mr Rajinder Singh and Mr Lam referred to *Pang Kok v Leong Fock Hap & Anor* [1996] 4 MLJ 97; *Bar Council v Datuk V Kanagalingam* [2000] 3 CLJ 697 (cited by the first respondent) as authority for the court to undertake the review of the taxed costs. It is trite from a plethora of authorities cited including the cases of *Pang Kok* and *Datuk V Kanagalingam* that basically the premise upon which the court will interfere with the decision of the taxing registrar is if it can be clearly shown that in the exercise of his discretion to award the costs, the taxing registrar has made an obvious mistake or has exercised his discretion capriciously or mischievously or there are some error of principles, (see *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [2002] 3 MLJ 705, *Gelombang Sepadu Sdn Bhd v Tal Seng Enterprise Sdn Bhd* [1998] 7 MLJ 187, *Ketua Pengarah Hasil Dalam Negeri v Damansara Jaya Sdn Bhd* [1999] 2 MLJ 374 (all cited by first respondent), *Union Insurance Malaysia Sdn Bhd v Chan You Young* [2003] 3 MLJ 484, *MC Corbett v Ipoh Tin Dredging Ltd* [1936] 1 MLJ 222 and *Starlite Ceramic Industry Ltd v Hiap Huat Pottery* [1973] 1 MLJ 146).

**[9]** In her certificate, the learned SAR had referred to the four grounds of objection raised on behalf of the first respondent which are the same grounds submitted by learned counsel for the first respondent before me as follows:

(1) tiada perbicaraan kes di mahkamah terbuka. Kes dijalankan atas hujahan bertulis;

(2) cuma terdapat dua isu yang perlu diputuskan bersabit liabiliti pemohon terhadap responden pertama;

(3) tiada isu rumit undang-undang;

(4) pemohon sengaja memanjangkan masa dengan melampirkan dokumen yang tidak perlu untuk mendapatkan jawapan kepada persoalan yang ditimbulkan.

**[10]** Thereafter the learned SAR stated the reasons as to why she confirmed the 'getting up' costs of RM20,000 given by the learned DR as follows:

> Mahkamah telah membuat keputusan pada 8 Julai 2004 dengan mengekalkan kos getting up sebanyak RM20,000. Dalam menjalankan kuasa budi bicara mahkamah telah merujuk kepada A 59 Bahagian X Kaedah-Kaedah Mahkamah Tinggi 1980. Isu yang dibangkitkan dan persoalan undang-undang yang boleh diputuskan oleh mahkamah di bawah Akta Timbangtara bukanlah undang-undang yang senang. Ianya memerlukan skil dan kerja yang tinggi. Pengendalian kes di bahagian rayuan

& kausa-kuasa khas sememangnya tidak ada perbicaraan penuh, Perbicaraan adalah berdasarkan affidavit-affidavit dan dokumen yang dikemukakan ke mahkamah. Di samping itu dokumen yang dilampirkan adalah banyak dan tebal, kesemua dokumen diperlukan untuk membuktikan tuntutan di mahkamah.

**[11]** Having considered the reasons of the learned SAR as contained in her certificate and the arguments of counsel for both sides, I am of the view that there is no ground upon which I ought to interfere with the learned SAR's exercise of discretion as she has taken into account the relevant principles.

**[12]** In the circumstances I affirm the decision of the learned SAR and the first respondent's application (encl 17) is dismissed with costs to be taxed unless otherwise agreed.

*Application dismissed with costs to be taxed.*

Reported by Ashgar Ali Ali Mohamed